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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment to the Constitution, Rule 11(e) of the Federal Rules of Criminal Procedure, may be interpreted to permit individual district judges to reject, as a matter of policy, all plea bargains in which the Government and the defendant agree to a specific sentence.

> [The following two questions are presented in the Petition for Writ of Certiorari in *Dennis Mastro and Peter DeLamos* v. *United States*, No. 82-894. Petitioner hereby adopts them by reference.]

2. "Were Defendant's Sixth Amendment rights violated by rulings under Rule 801, Federal Rules of Evidence, whereby Defendants were not confronted by witnesses against them, but by tape recordings involving two men who were dead at the time of the indictment (but were nevertheless named as 'unindicted-co-conspirators'), and one 90-year old man named as a Defendant and co-conspirator (but who did not appear at the trial under a severance order based on his age and physical infirmities)?"

3. "Were Defendant's Fifth Amendment rights to a fair trial and due process of law violated by rulings under Rule 801, Federal Rules of Evidence, resulting in convictions on the basis of tape recordings of coerced and involuntary statements made by Defendants who were actually the victims of an extortion conspiracy but who, because of fear of severe or fatal injury to themselves or members of their families, pretended to complicity in a plan of their victimizers to share unlawfully in the profits of a Las Vegas restaurant-casino?"

PARTIES BELOW

Dennis Mastro and Peter DeLamos were co-defendants with petitioner Bendetti in the United States District Court for the District of New Jersey and were co-appellants on the consolidated appeals in the United States Court of Appeals for the Third Circuit. Messrs. Mastro and DeLamos have filed a separate petition for a writ of certiorari: No. 82-894, filed November 29, 1982.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Bendetti respectfully requests that the Court grant his petition for writ of certiorari to review the judgment of the court below affirming his criminal conviction in the United States District Court for the District of New Jersey.

OPINIONS BELOW

The court of appeals did not file an opinion. The Judgment Order affirming the convictions appears as Appendix A to the Petition for Writ of Certiorari filed by co-defendants Mastro and DeLamos (No. 82-894).

JURISDICTION

The Judgment Order of the court of appeals was entered on September 29, 1982 (Petition in No. 82-894, App. A). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated

October 22, 1982 (*id.* App. B). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Rule 11 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "(e) *Plea Agreement Procedure*
>
> "(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> "(A) move for dismissal of other charges; or
>
> "(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> "(C) agree that a specific sentence is the appropriate disposition of the case.
>
> The Court shall not participate in any such discussions.
>
> "(2) *Notice of Such Agreement.* * * * If the agreement is of the type specified in subdvision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does

not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea." [As amended April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; April 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980.]

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Petitioner Bendetti and his co-defendants Mastro and DeLamos were convicted in the United States District Court for the District of New Jersey (Frederick B. Lacey, J.) of violating certain Racketeer Influenced and Corrupt Organizations (RICO) provisions, 18 U.S.C. § 1962(c) and (d), by conducting, and conspiring to conduct, the affairs of a casino in Las Vegas, Nevada, through a "pattern of racketeering activity," involving travel and use of facilities in interstate commerce to promote, establish, and carry on unlawful hidden ownership and management of the casino. They were also convicted on eleven counts of substantive violations of 18 U.S.C. § 1952, by travelling or using facilities in interstate commerce to promote, establish, and carry on unlawful hidden ownership and management of the casino. The conspiracy of which they were convicted included—in addition to the three defendants—three "underworld crime figures." Two of these, Anthony Russo and his brother John Russo, were unindicted co-conspirators, both dead by the time of indictment. The third, Ruggerio Boiardo, had been indicted with defendants but, because of his age and infirm condition, was severed as unprosecutable before trial.

Petitioner Bendetti, like his two co-defendants, was sentenced to three years imprisonment and a fine of $25,000 on the § 1962(d) RICO conspiracy count, a concurrent term of three years and $25,000 on the § 1962(c) substantive RICO count, and a concurrent term of three years and $10,000 on the first § 1952 count. On the re-

maining § 1952 counts, sentence was suspended and a term of five years probation was imposed, consecutive to the prison terms.

On consolidated appeals, the court of appeals affirmed by order (Adams, Hunter, Becker, JJ.) and denied a petition for rehearing and suggestion for rehearing *en banc*. Issuance of the mandate has been stayed pending disposition of the petitions for writ of certiorari.

B. The Rejected Plea Bargain

Before trial, petitioner and his two co-defendants negotiated a "Type C" plea bargain with the Government—that is, a plea pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, in which the Government attorney "agree[s] that a specific sentence is the appropriate disposition of the case." By the terms of this plea, Bendetti and Mastro would plead guilty to one of the § 1952 counts and would receive a non-custodial sentence of five years probation and a $10,000 fine; DeLamos would plead guilty to a complaint in Nevada charging violation of Nevada Gaming Commission regulations, and the Government would move to dismiss the indictment against DeLamos; and all three defendants would execute a consent judgment to a civil RICO complaint under 18 U.S.C. § 1964(a), requiring defendants to pay $170,000 to the United States and enjoining defendants from engaging in any casino gambling activities.

At a status hearing on July 7, 1981, the Government presented to the court a letter from the Government Attorney in Charge and approved by the Chief of the Organized Crime and Racketeering Section of the Justice Department. In that letter, the Government set forth a number of considerations supporting the agreement for disposition of the case, including the defendants' submission of themselves to questioning by Government investigators and prosecutors. It also stated:

> "[T]he Government has been mindful of the fact * * * that it was the Russo-Boiardo element which insinuated itself into these defendants business venture. In contrast to the activities of the Russo-Boiardo group, these defendants did not engage in extortionate-type conduct, nor did they embark upon any grand design to form and implement a ubiquitous venture which would pervade and pervert the entire fabric of the gaming industry. As to them, there is no organized crime network to be dismantled." P. 3a, *infra*.

This letter is quoted in its entirety in Appendix A hereto.

At a hearing on July 13, 1982, Judge Lacey rejected the plea. He did not state that he was doing so because of any particular dissatisfaction with the elements of the plea bargain as applied to any or all of the defendants. Instead, he stated that he saw no "necessity" for any Type C pleas in his court. In particular, he said:

> "A (C) plea agreement in some districts may be a necessity but I never thought it was a necessity in this district and I still don't think so.
>
> "I have seen justice served full well by the kind of count disposition that this office has followed from time immemorial since I've been practicing law in this area. And when I was United States Attorney it worked just as well. And I just don't think it creates a healthy situation. And again, I reiterate I see no necessity for it and I don't think I'll go beyond that." Tr. July 13, 1981, p. 14; p. 11a *infra*.[1]

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[1] In its brief in the court of appeals, the Government stated:

> "In light of the background of the case, *the sentence proposed* and the novelty of the prosecutor's recommendation in this district, the Court stated that it saw no necessity to accept the recommendation of a specific sentence by the government." Brief for Appellee at 12 (emphasis added).

In a footnote, the Government quoted a passage from the July 7, 1981, hearing in which the court had referred, with apparent disapproval, to the proposed sentences. The footnote then went on:

C. The Admission of Tape Recordings

[See Petition in No. 82-894]

REASONS FOR GRANTING THE WRIT

Rule 11(e) of the Federal Rules of Criminal Procedure does not, by its terms, authorize each individual district court judge to decide, as a matter of policy, that "Type C pleas"—pleas where the Government and the defendant agree "that a specific sentence is the appropriate disposition of the case"—are unacceptable in that judge's court. Nevertheless, some courts of appeals have indicated that Rule 11(e) grants individual judges such broad power, and the trial judge in this case, with the approval of the court of appeals, acted on the assumption that he was authorized to refuse any Type C plea. This Court should grant certiorari to resolve the extent of a judge's power to reject a plea bargain and should hold that district judges are not authorized to reject all Type C pleas, without regard to the particular features of the case before them.

"Those reasons, and others, were reiterated by the Court in its formal rejection of the tendered plea agreement on July 13, 1981. See Tr. of July 13, 1981 proceedings at 9, 11-14." Brief for Appellee at 12, n.2.

With due respect, the cited pages of the July 13, 1981, transcript—where Judge Lacey made his formal ruling on the plea bargain—do not repeat any expression of disapproval of the proposed sentences. The entire relevant colloquy at the July 13, 1981, hearing is quoted in Appendix B.

In petitioner's view, Judge Lacey plainly chose to rest his ruling on the assumed power of a District Judge to refuse to permit *any* Type C pleas in his court. At the very least, the record does not permit a finding that Judge Lacey would have made the same ruling had he felt obliged to accept Type C pleas as a general matter. The Court of Appeals made no such finding.

Construing a predecessor version of Rule 11,[2] the District of Columbia Circuit held that, while the Rule provides that a trial court "may refuse to accept a plea of guilty," there are limitations on a judge's discretion to reject a plea bargain. *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) (Leventhal, J.). The prosecutor in that case had agreed that the defendant could plead guilty to second degree murder and that a first degree murder charge would be dismissed. The trial judge decided that "under Rule 11 * * * it had the discretion to refuse the plea when it found that the crime was so heinous and the evidence of guilt so overwhelming that the public interest would be ill-served by a judgment of second degree murder, which it referred to as a 'tap on the wrist.'" 497 F.2d at 618. The court of appeals held that this decision was erroneous. It ruled, *inter alia*, that the district judge "cannot disapprove of [the prosecutor's] action on the ground of incompatibility with prosecutive responsibility unless the judge is in effect ruling that the prosecutor has abused his discretion." 497 F.2d at 622. It further ruled that "a judge is free to condemn the prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case." *Id.*

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[2] Prior to the 1975 amendments, Rule 11 provided, in its entirety:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Quoted in *United States* v. *Ammidown*, 497 F.2d 615, 618 n.3. (D.C. Cir. 1973).

Ammidown stands for the proposition that a district judge may not reject a guilty plea merely because the judge disagrees with the prosecutor's assessment of the public interest. The decision is inconsistent with what occurred in this case—a district judge rejecting any Type C plea as a matter of policy, without any finding that the proposed plea inappropriately encroaches on the judge's sentencing authority and without any finding that the prosecutor has otherwise abused his authority.

In its brief in the court of appeals below, the Government attempted to distinguish *Ammidown* by contending that it was superseded by the 1975 amendments to Rule 11. The Government contended:

> "Under Fed.R.Crim.P. 11(e)(2), (4), the District Court may reject or accept a plea agreement reached by the parties. The intent of Congress in enacting the 1974 Supreme Court amendments to Rule 11(e) was to afford a district court complete authority to decide for itself whether it will permit parties to present a plea agreement to it." Brief for Appellee at 12-13.

The Government relied on the following excerpts from the House Committee Report on the amendments to Rule 11:

> "The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; *a court is free not to permit the parties to present plea agreements to it.*
>
> "* * * *
>
> "Rule 11(e) as proposed permits *each* federal court to decide *for itself* the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea

negotiations and agreements *if, and to the extent that,* the court permits such negotiations and agreements.[7a]

"[7a] Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit *any form* of plea agreement to be presented to it. * * *"

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 6 & n.7a (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 678-79 & n.7a (emphasis as added by the Government below, see Brief for Appellee at 13).

This legislative history is not as clear as the Government would like. *Ammidown* was a controversial and well-publicized ruling by a distinguished federal judge. Yet neither the Advisory Committee Notes nor the House Committee Report quoted above state that the amended Rule was intended to repudiate that decision. Indeed, *Ammidown* was not cited in either place. The statements of the House Report are consistent with the view that Rule 11 was intended to leave the issue of the scope of the judge's discretion to reject plea bargains a matter for developing case law.

The Government's broad reading of the legislative history of Rule 11(e) as repudiating *Ammidown* is supported by the decisions of two circuits—the Fifth and the Eighth.

In *United States* v. *Bean*, 564 F.2d 700, 702-03 (5th Cir. 1977) (footnote omitted), the court stated:

> "While Rule 11(e) provided guidelines for plea bargaining procedure, the Rule does not contravene a judge's discretion to reject such a plea. * * * The drafters of the Rule intended for the judge to retain

> discretion in accepting plea bargains [citing H.R. Rep. No 94-247 and the Notes of the Advisory Committee [a]].
>
> "* * * *
>
> "In considering plea bargains, courts may be governed by the same broad standards that apply in sentencing. * * * Consistently, this circuit, as well as other circuits, has permitted the decision of the trial court as to sentencing to prevail except in extreme circumstances."

In an accompanying footnote, the Fifth Circuit rejected *Ammidown* in the following words:

> "* * * *
>
> "Since this case [*Ammidown*] was decided before Rule 11 was amended specifically to cover plea bargains, this decision may not represent the standards for accepting plea bargains under the new rule. In any event, we find unacceptable the District of Columbia standard that a court must accept the plea unless the bargain is 'such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.' * * * To our knowledge no other circuit has followed the District of Columbia in so drastically limiting the discretion of a judge in regard to plea bargains." 564 F.2d at 703 n.4.

See also *United States* v. *Adams*, 634 F.2d 830, 835 (5th Cir. 1981) (Rule 11(e) "does not in any way limit the judge's discretion in deciding whether to accept a plea agreement. We have held that this discretion is governed by the same broad principles as govern the trial judge's

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[a] The Advisory Committee Notes to the 1975 amendments contain the following paragraph:

> "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge." 62 F.R.D. 285 (1974).

discretion in sentencing.") (citing, *inter alia*, *United States* v. *Bean*, *supra*).[4]

Similarly, in *United States* v. *Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981), the court affirmed the rejection of a plea bargain, although the trial judge had given no reason, stating: "Rule 11 does not require district courts to either accept a guilty plea or delineate its reasons for rejecting it." It added the following footnote:

> "Appellant places emphasis on *United States* v. *Ammidown* * * *.
>
> "The precedential value of *Ammidown* has been considerably diminished since the adoption of the 1974 amendments to Rule 11 that were intended to increase the discretionary authority of the district court in dealing with guilty pleas. See H.R. Rep. No. 94-247 [*supra*]." 637 F.2d at 1196 n.3.

By contrast, the First Circuit accepts the continued validity of *Ammidown*.[5] In a recent decision refusing to hold that the rejection of a plea bargain was an abuse of discretion, *United States* v. *Escobar Noble*, 653 F.2d 34 (1st Cir. 1981), the court did not rely on any notion that the trial judge's discretion under Rule 11(e) was essentially unlimited. It said:

> "This is not a case where acceptance of the plea agreement is both reasonable and necessary to secure a legitimate and important prosecutorial interest. See *United States* v. *Ammidown* * * *. * * * The only

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[4] In a still later decision, the Fifth Circuit cited the *Ammidown* case in considering the circumstances under which a trial judge may deny a Government motion to dismiss a prosecution. *United States* v. *Hamm*, 659 F.2d 624, 628 n.15, 631 n.23 (5th Cir. 1981) (*en banc*). The *Hamm* decision, however, did not retreat from either *Bean* or *Adams*.

[5] Petitioner notes that *Ammidown* has not been questioned or modified in the District of Columbia Circuit.

> justification offered for the proposed plea agreement was that the possible sentence under a felony conviction 'would not be just' * * *. * * * [The prosecutor] presented no prosecutorial interests—obtaining evidence, avoiding a prosecution of uncertain success, or conserving prosecutorial resources—that would have been furthered by the plea bargain. The bargain he proposed was thus intended only to control sentencing, a matter ordinarily within the discretion of the court. Under such circumstances a court has wide latitude to reject a plea bargain. *Compare United States* v. *Bean*, * * *." 653 F.2d at 36-37.

The First Circuit's acknowledgment that a trial court has "wide latitude" to reject a plea bargain when the judge is dissatisfied with the sentence is irrelevant to the instant case, where the trial judge acted on a *different* basis: disapproval of Type C plea bargains in general, except perhaps in extraordinary circumstances. Furthermore, the prosecutor below did set forth valid prosecutorial interests—including both the defendants' cooperation in providing information and conservation of resources. See App. A hereto.

In *Santobello* v. *New York*, 404 U.S. 257, 261 (1971), this Court said:

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

See also *Brady* v. *United States*, 397 U.S. 742, 751-52 (1970).

Since plea bargains are such an essential part of the criminal process, this Court should resolve whether either the Advisory Committee or the Congress intended—or could lawfully have intended—to delegate to individual district court judges the power to refuse to consider a particular type of plea. The detailed provisions of Rule 11 are primarily aimed at ensuring that a guilty plea—whether or not part of a plea bargain involving other charges or the sentence—is made voluntarily and with sufficient information (Rule 11(c), (d), (e)(2)) and that there is a factual basis for the plea (Rule 11(f)), not at endorsing unlimited judicial discretion in rejecting pleas. It is one thing for a trial judge to exercise discretion on the facts of a particular case; it is quite another for the judge to develop his or her own rule of law that a certain type of plea is not acceptable in that judge's court. The resulting differences in procedure before different judges are inherently arbitrary.

This Court has stated, in *dictum*, that a criminal defendant does not have "an absolute right to have his guilty plea accepted by the court." *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962). Petitioner claims no such right. In *Santobello*, the Court said: "A court may reject a plea in exercise of sound judicial discretion." 404 U.S. at 262. This petition presents the question of what factors may be considered in the exercise of such discretion.

Even in the area of sentencing, where the scope of a trial judge's discretion has historically been broad, a trial judge can abuse that discretion by adopting an inflexible practice of imposing the maximum term permitted by law. In *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974), the court found that "[s]uch a policy is under no reasonable conception an exercise of judicial discretion." It continued:

> "As the Sixth Circuit has stated, '[a] trial court which fashions an inflexible practice in sentencing contra-

> dicts the judicially approved policy in favor of "individualizing sentences." ' United States v. Daniels, 6 Cir. 1971, 446 F.2d 967, 971, *quoting* Williams v. New York, 1949, 337 U.S. 241, 248 * * *. *See also* United States v. Baker, 2 Cir. 1973, 487 F.2d 360, where the court said: 'We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant' * * *." *Id.*

Given the importance of plea bargaining in the criminal justice system, the same requirement of individualized consideration must limit the exercise of discretion under Rule 11(e), particularly where the proposed plea bargain contains an agreement on the appropriate sentence.

The circuits have divided, as set forth above, on the scope of a judge's discretion under Rule 11. This Court should grant certiorari to consider whether Rule 11 in fact can be read to authorize individual district judges to engage in the kind of rulemaking that occurred in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted on Question No. 1. If the petition in No. 82-894 is granted, this petition should be granted on Questions Nos. 2 and 3.

Respectfully submitted,

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